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Protection of Innocent Persons against Misuse by Police Authorities of Photographs and Fingerprints

Upon his acquittal of a criminal charge plaintiff, in the recent case of *State ex rel. Mavity v. Tyndall*[1] brought an action against public officials[2] for return of fingerprints, photographs and measurement records taken against his will. The court held plaintiff was entitled to an injunction against the exhibition of his picture in the rogues' gallery but not to have the records returned to him. Though the maintenance of records and classification of criminals are necessary for good police administration, the injury which they may cause innocent persons must be taken into consideration.

Plaintiff based his claim for relief on his "right of privacy." Although often referred to as a property right[3] the Indiana court recognizes the "right of privacy" as essentially an interest of personality. Interests of personality may be classified as: (1) physical integrity, (2) feelings and emotions, (3) capacity for activity or service, (4) name, (5) likeness, (6) history, and (7) privacy or right "to be let alone."[4] There have been few cases where an actual invasion of privacy has been recognized.[5] Since the inception of the "right of privacy" doctrine,[6] however, courts have tended to utilize it as a "catch-all" to describe many situations which are either invasions of other interests of personality[7] or invasions of some rela-

[1] —Ind.—, 66 N.E. (2d) 755 (1946).

[2] Mayor, Members of Board of Public Safety, Chief of Police and former Chief of Police of Indianapolis.

[3] Munden v. Harris, 153 Mo. App., 652, 134 S.W. 1076 (1911); Pavesich v. New England Life Insurance Co., 122 Ga. 190, 215, 50 S.E. 68 (1904).

[4] Green, "The Judicial Process in Tort Cases" (1939); Green, the Right of Privacy (1932) 27 Ill. L. Rev. 237.

[5] I de S et ux. v. W de S., Y. B. Liber Assisarum f. 99, pl. 60 (1348), (late at night defendant beat upon plaintiff's door with a hatchet); Rhodes v. Graham, 238 Ky. 225, 37 S.W. (2d) 46 (1931) (damages awarded for tapping telephone wire running into plaintiff's home); Chappel v. Stewart, 82 Md. 323, 33 Atl. 542 (1896) (injunction against shadowing denied); Schultz v. Frankfort Marine, Accident & Plate Glass Ins. Co., 151 Wis. 537, 139 N.W. 386 (1913) (shadowing held libelous); De May v. Roberts, 46 Mich. 161, 9 N.W. 146 (1881) (defendant, a stranger, held plaintiff's hand during childbirth); Molt v. Public Indemnity Co., 161 Atl. 346, 10 N.J. Misc. 879 (1936) (insurance company canvassed neighborhood questioning plaintiff's habits and character); Clayman v. Bernstein, Phila. Legal Intelligencer, Feb. 7, 1940, p. l., col. 1 (Phila. C.P. 5, 1940) (photograph of plaintiff's facial disfigurement taken by doctor while plaintiff semi-conscious in a hospital); Barber v. Time, Inc., 348 Mo. 1199, 159 S.W. (2d) 291 (1942) (plaintiff afflicted with rare disease causing her to eat to excess but still lost weight; against her wishes, one reporter of defendant took her picture in hospital while other diverted her attention, and published picture and article under title "Starving Glutton").

[6] Warren and Brandeis, The Right to Privacy (1890) 4 Harv. L. Rev. 193.

[7] *Physical integrity:* Candler v. Byfield, 160 Ga. 732, 125 S.E. 905 (1924) (aboard ship defendant broke into plaintiff's room and made attack upon his wife).

Capacity for activity or service: Blazek v. Rose. Not reported but cited in Pound & Chafee, "Cases on Equitable Relief Against Defamation and Injuries to Personality" (plaintiff was the son of Rosa Blazek whose body was grown together with that of her sister. His mother and her sister had a contract with defendant for exhibition purposes. Plaintiff was forced to be a part of the exhibition scheme. His entire personality was appropriated: capacity for activity and service, physical integrity, name, likeness, history and privacy).

Name: Edison v. Edison Polyform Mfg. Co., 73 N.J. Eq. 136, 67 Atl. 392 (1907); Vanderbilt v. Mitchell, 72 N.J. Eq. 910, 67 Atl. 97 (1907); Coffey v. Metro-Goldwyn-Mayer Corp., 289 N.Y.S. 882 (1936); Elmhurst

tional interest.[8]

In the instant case the question does not involve an invasion of the right of privacy, an interest of personality, but on the other hand involves an interference with plaintiff's social relations, namely: his general standing in the community. The question therefore is whether this interference constitutes an abuse of governmental power[9] on the part of the defendants in the exercise of their police functions. Police officials have the unquestioned right to fin-

v. Pearson, et al., 153 Fed. 2d, 467 (app. D.C. 1946) (Drew Pearson stated on radio program plaintiff was a bartender at Shoreham Hotel and overheard conversations of James F. Byrnes and other high officials, no recovery, legitimate news item).

Likeness: Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902) (dissent) (Following year a statute was passed prohibiting use of a person's name or picture for commercial purposes without his consent in writing. Art. 5, paragraphs 50, 51 of Civil Rights Law, New York Annotated Statutes); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1904); Kunz v. Allen, 102 Kan. 883, 172 Pac. 532 (1918); Flake v. News Co., 212 N.C. 780, 195 S.E. 55 (1937) (unauthorized use of plaintiff's picture in newspaper to advertise burlesque show and certain brands of bread).

History: Melvin v. Reed, 112 Cal. App. 285, 297 Pac. 91 (1931); Mau v. Rio Grande Oil, Inc., 28 F. Supp. 845, (N. D. Cal. S. D. 1939) (incidents of a holdup in which plaintiff was the victim were broadcast in a radio program "Calling All Cars"); Baker v. Libbie, 210 Mass. 599, 97 N.E. 109 (1912); Baumann v. Baumann, 250 N.Y. 382, 165 N.E. 819 (1929) (dissent); Cameron v. Cameron, 111 W.Va. 375, 162 S.E. 173 (1932); Sidis v. F-R Pub. Corp. (CCA 2nd, 1940) (article published in New Yorker magazine about child prodigy who had become an insignificant clerk in later life); Elmhurst v. Pearson, et al. (153 Fed. 2nd, 467) (App. D.C., 1946).

[8] *Family Relations:* Douglas v. Stokes, 149 Ky. 506, 149 S.W. 849 (1912) (twin boys born joined from shoulders down were photographed; photographer without consent of parents published and had copyrighted the picture); Bazemore, et al. v. Savannah Hospital, et al., 171 Ga. 257, 155 S.E. 194 (1930) (child born with heart on outside of body. After death, pictures of nude body taken and given to newspaper and sold to strangers —parents sue).

Social Relations: Brentz v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927) (unpaid garage bill posted in window of garage on busy street); *Cf.* Judevine v. Benzies-Montanye Fuel & Warehouse Co., 222 Wis. 512, 269 N.W. 295 (1936) ($4.32 account advertised for sale by distributing handbills).

Professional Relations: Louka v. Park Entertainments, Inc., 294 Mass. 268, 1 N.E. (2d) 41 (1936) (wrongful display of actress' picture at burlesque show injured her professional relations); Flake v. News Co., 212 N.E. 780, 195 S.E. 55 (1937); Trolley v. J. S. Fry and Sons, Ltd. (1931) H.L.A.C. 333 (advertisement portraying caricature of amateur golfer with packet of defendant's chocolates protruding from his pocket; limerick underneath).

Trade Relations: Brentz v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927); *Cf.* Judevine v. Benzies-Montanye Fuel & Warehouse Co., 222 Wis. 512, 269 N.W. 295 (1936); Goodyear Tire & Rubber Co. v. Vandergriff, 52 Ga. App. 662, 184 S.E. 452 (1936) (secret and confidential sales prices on automobile tires obtained by impersonating plaintiff causing interference and interruption in his business).

[9] There are many abuses of governmental power which fall outside the scope of the general decisions of tort law. The more usual instances are found in false arrests and imprisonment by police officers, excessive attachments, illegal seizures, perversions of judicial power. In fact they run the whole range of hurts that may be inflicted by private individuals. The official is normally protected by some immunity which good policy has developed to protect officials from private suits. It is only when the abuse of governmental powers is clear that the courts are inclined to deal severely with the offender. See Green, "The Judicial Process in Tort Cases" (1939) (P. 1341).

gerprint, photograph and measure one who is arrested.[10] Prior to trial they will not be compelled to return or destroy the records,[11] but may be restrained from publishing or disseminating such information in advance of conviction.[12] After trial and conviction the right to publish and disseminate fingerprints, photographs and other descriptive data has been universally upheld for protection of society.[13] Acquittal or discharge, however, presents a different problem. Since plaintiff's reputation and standing in the community which forms the basis of his social relations may be greatly injured by the publication of such data, most courts have limited their publication.

In determining how far the courts should go in their attempts to restore to an innocent person the unblemished record he enjoyed prior to arrest, interests of the state must be carefully balanced against those of the individual. Since it is necessary in the efficient conduct of police affairs that reasonable discretion be allowed police officials,[14] courts are reluctant to grant relief except in the clearest cases. Thus it has been held that the arrest procedure is an administrative measure to which one must submit at times for the common good and relief was denied.[15] Some courts compel return or destruction of pictures, including the erasing and cancelling of measurement records.[16] In between these two extremes are found many interesting variations.[17]

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[10] State, ex rel. Bruns v. Clausmeier, et al., 154 Ind. 599, 57 N.E. 541 (1900); Downs v. Swann, 111 Md. 53, 73 Atl. 653 (1909); Shaffer v. U.S. (App. D.C. 1904); Owensby v. Morris, et al. (Tex. Civ. App. 1935), 79 S.W. (2d) 934 (1935); Shannon v. State, 207 Ark. 658, 182 S.W. (2d) 384 (1944) (plaintiff charged with murder, first degree, released on bail and ordered back to be fingerprinted before trial); *Contra:* Gow v. Bingham, 107 N.Y.S. 1011 (1907).

[11] Bartletta v. McFeeley, 107 N.J. Eq. 141, 152 Atl. 17, *aff'd* 109 N.J. Eq. 241, 156 Atl. 658 (1931).

[12] State ex rel. Read v. Harris, 348 Mo. 426, 153 S.W. (2d) 834 (1941); McGovern v. Van Riper, 137 N.J. Eq. 24, 43 Atl. (2d) 514 (1945) (declared unconstitutional a statute requiring copies of fingerprints and photographs be forwarded without delay to state bureau of identification. Dissolved a restraint against the taking of such records but continued restraint against forwarding and disseminating or publishing them in advance of conviction. Declared, "Right of privacy has its origin in natural law, is immutable and absolute, and transcends the power of any authority to change or abolish it." *Contra:* Mabry v. Kettering, 89 Ark. 551, 117 S.W. 746 (1909).

[13] Hodgeman v. Olsen, 86 Wash. 615, 150 Pac. 1122 (1915) (the relation of the public to one convicted of crime is such as to forfeit whatever right of privacy the convict may have had with reference to the publication of his photograph, so far as protection to the public is concerned).

[14] Fernicola v. Keenan, 136 N.J. Eq. 9, 39 Atl. (2d) 851 (1944); Bartletta v. McFeeley, 107 N.J. Eq. 141, 152 Atl. 17, *aff'd.* 109 N.J. Eq. 241, 156 Atl. 658 (1931), cited *supra* note 10.

[15] Fernicola v. Keenan, 136 N.J. Eq. 9, 39 Atl. (2d) 851 (1944), cited *supra* note 14.

[16] Itzkowitz v. Whitaker, 117 La. 708, 42 So. 228 (1906) (plaintiff ran a pawnshop and had been arrested many times but not convicted. Court gave injunction to suspend exhibition of photograph and to stop distribution of copies and ordered them returned to him. Also ordered entries of such records be erased and cancelled. Court said display of his picture would be permanent proof of dishonesty—purpose of injunction to restore original status quo as far as possible); Schulman v. Whitaker, 117 La. 704, 42 So. 227 (1906) (stolen goods—another pawnbroker case with a similar result).

[17] Owen v. Partridge, 82 N.Y.S. 248 (1903) (innocent man arrested and discharged. New York Court of Appeals had repudiated doctrine of "privacy." Held, injunction not proper remedy for a completed trespass, should be an action at law. Now covered by statute); Downs v. Swann,

The Federal rule, declared by the office of the Attorney General, provides that the records are not to be made public prior to trial, and after acquittal they are to be destroyed or surrendered to the defendant.[18] Similarly, by statute[19] New York has provided for return of photographs and records. Failure to comply with the statute results in the police officials involved being guilty of a misdemeanor. In the absence of a statute, as indicated by the Indiana Court, there appears to be no adequate remedy at law. While no legal obstacle prohibits granting relief approximating the federal rule and al-

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111 Md. 53, 73 Atl. 653 (1909) (taking of records does not violate personal liberty secured by federal or state constitutions, but restrained placing picture in rogues' gallery of anyone not an habitual criminal. Police officers offending liable same as private individuals); Miller v. Gillespie, 196 Mich. 423, 163 N.W. 22 (1917) (innocent person not entitled to have record cancelled or destroyed on ground privacy invaded, didn't deny right of privacy but held plaintiff not exposed to ridicule or disgrace); Bartletta v. McFeeley, 113 N.J. Eq. 67, 166 Atl. 144 (1939) (court will not compel police officials to remove from rogues' gallery of other cities' copies of plaintiff's photograph and fingerprints which police forwarded. Usual reason given, not properly joined as parties to the action); People v. Hevern, 215 N.Y.S. 412 (1926) (time may be when this system of identification becomes so universal that it is no longer connected in thought with crime. The mores of people constantly change. But the innocuity of a practice must be tested in the light of its prevailing and not possible future significance. Held, compulsory fingerprinting before conviction is an unlawful encroachment upon a person, in violation of the state and federal constitutions). *Contra:* Kidd—Right to Take Fingerprints, Measurements and Photographs (1919) 8 Calif. L. Rev. 25; People ex rel. Gow v. Bingham, 107 N.Y.S. 1011 (1907) (court called plaintiff's plight an outrage but held mandamus was not proper remedy); People ex rel. Joyce v. York, et al., 59 N.Y.S. 418 (1899) (mandamus will issue only to compel a public officer to perform a duty imposed upon him by law); Fernicola v. Keenan, 136 N.J. Eq. 9, 39 Atl. (2d) 851 (1944) (if an innocent man is acquitted, it seems police should destroy records and remove picture from gallery. But in absence of a statute, discretion in matter belongs to police).

[18] U.S. v. Kelly, 55 F. 2d 67 (CCA 2nd, 1932). A Hand, J. said: "it should be added that all United States Attorneys and Marshals are instructed by the Attorney General not to make public, photographs, Bertillon measurements or fingerprints prior to trial, except when the prisoner becomes a fugitive from justice, and are required to destroy or to surrender to the defendant all such records after acquittal or when the prisoner is finally discharged without conviction. There is therefore as careful provision as may be made to prevent the misuse of the records and there is no charge of any threatened improper use in the present case.").

[19] Baldwin's N.Y. Cons. Laws, Art. 46, Sec. 516 Penal Laws, *"Return of Fingerprints and Photographs."*

Upon determination of a criminal action or proceeding against a person, in favor of such person, unless such person has previously been convicted in this state of a crime or of the offense of disorderly conduct or of being a vagrant or disorderly person or has previously been convicted elsewhere of any crime or offense which would be deemed a crime or the offense of disorderly conduct, vagrancy or being a disorderly person if committed within the state, every photograph of such person and photographic plate or proof and fingerprints taken or made of such person while such action or proceeding is pending by direction or authority of any police officer, peace officer or any member of any police department, and all duplicates and copies thereof shall be returned on demand to such person by the police officer, peace officer or member of any police department having any such photograph, photographic plate or proof, copy or duplicate in his possession or under his control; and such police officer, peace officer or member of any police department failing to comply with the requirements hereof, shall be guilty of a misdemeanor. (Effective 24 Feb. 1936.) In Hawkins v. Kuehne, 137 N.Y.S. 1090 (1912) (plaintiff collected damages from police officials for wrongfully taking fingerprints and photographs under a similar statute then existing).

though there is respectable authority[20] to justify greater relief by a court than that given in the principal case, it presents a situation in which more adequate and complete protection would be afforded by appropriate statutory action. Uniformity of relief would be thereby assured and courts would not be justified in unduly interfering in police administration problems or on the other hand in not giving adequate relief.

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[20] *Supra* note 16.